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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 260.

HUGH WALLACE ET AL., PLAINTIFFS IN ERROR,

v.

ELLA ADAMS ET AL., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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It is our intention, as far as possible, in the preparation of this brief to avoid ground already covered by the able argument presented by Messrs. Cruce, Cruce & Bleakmore. We desire, however, to present briefly as may be certain additional views which have particularly appealed to us.

In beginning this discussion, it seems important to call the attention of the court to—

The Exact Position Occupied by Choctaw Citizens Toward the United States at the Time of the Events Complained of.

By the agreement between the Choctaw and Chickasaw nations, entered into April 23, 1897, and embodied in chapter 517 of the Acts of the Second Session of the 55th Con-

gress (30 Stat., 495), it was provided that, except as modified by said agreement, tribal government should—

> "continue for the period of eight years from the fourth day of March, 1898;"

and, further, that—

> "The Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States."

By a later act, that of March 3, 1901, chapter 868 (31 Stat., 1447)—

> "Every Indian in Indian Territory" was "declared to be a citizen of the United States and (was) is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

By section 31 of chapter 182 of the Acts of the 51st Congress, 1st session (26 Stat., 81)—

> "The Constitution of the United States * * * shall have the same force and effect in the Indian Territory as elsewhere in the United States."

It is apparent from the foregoing that a double citizenship was created, much as now exists with those of us who are at once citizens of the United States and of particular States, and that those who were Choctaws by birth or adoption were entitled, equally with other citizens of the United States, to possess and enjoy life, liberty, and property, unless the same were taken from them by "due process of law," in accordance with the constitutional provision.

But as Choctaws they possessed certain additional rights and privileges under their tribal government, which rights

and privileges, as we shall endeavor hereafter to show, constitute property, independent and apart from any question of ownership of particular tracts of land or ownership in common of tribal lands. For instance, only a Choctaw citizen could be a Representative (section 6, article 3, Choctaw Constitution), a Senator (section 3, article 3, Choctaw Constitution), or hold a number of offices (section 2, article 7, Choctaw Constitution). Citizens who found mines or mineral waters had the exclusive right and privilege of working the same within one mile from their works or improvements, not interfering with former settlers (section 18, article 7, Choctaw Constitution). Other public officers were only chosen by qualified electors (amendment, section 1, Choctaw Constitution). Non-citizens could only be employed after a permit had been obtained by their employers (section 2, title Permits, of the Laws). Before carpenters and workers at a number of different trades could engage in their callings, being non-citizens, they were required to obtain permits (section 3, title Permits). Permits were issued for the employment of non-citizen laborers (section 4, title Permits). The leasing of lands by citizens to non-citizens was expressly prohibited (section 2, title Claims and Improvements). Non-citizens not employed by a citizen of the Choctaw Nation and not authorized to live therein under a treaty stipulation who had made or bought improvements therein were notified to sell the same within a limited time (section 3, title Claims and Improvements). Non-citizens were not allowed to own, control, or hold any stock of any kind within the limits of the Choctaw Nation, except under permit, and then only subject to certain limitations (section 3, title Stockholders). Non-citizen herdsmen could not be employed by a citizen (section 2, title Stockholders). Non-citizens desiring to drive stock through the nation were required to pay a certain tax (paragraph 2, section 6, Stockholders). Non-citizens residing under trader's permit or otherwise were forbidden from enclosing any more lands

than sufficient to build their business or tenement house upon (section 1, act approved October 28, 1887). Citizens were forbidden from employing non-citizens to take charge of their cattle, etc., or hunt the same up when running on the ranch (under act passed November 9, 1887).

A certain recognition of the validity of the foregoing Indian laws is afforded by Morris *v.* Hitchcock (194 U. S., 384), which maintains that Chickasaw legislation imposing a privilege or permit tax on stock held by non-citizens was not repugnant to the Federal Constitution.

Conversely, citizens of the United States were under certain disabilities, so far as going into or transacting business within the Indian Territory is concerned. These varied disabilities added to the importance of Choctaw citizenship as such. For instance, and by way of illustration, section 2135 of the Revised Statutes provides for the punishment of any person other than an Indian who purchases certain articles from Indians within Indian country. Section 2157 prohibits any person other than an Indian from hunting or trapping game, except for subsistence, in Indian country. By section 2150 persons in the Indian Territory in violation of law could be ejected.

Can There Exist a Property Right in Citizenship Apart from a Right to a Particular Piece of Property?

In the decision of the Circuit Court of Appeals it was apparently considered that the plaintiffs in error had not been deprived of a property right, because their title to the tract of land in question had not been consummated by their names being formally placed upon the rolls of Choctaw citizens and the land not having been formally allotted to them. It was admitted that there had been a judgment or a finding of citizenship by the District Court of the Indian Territory, but the sufficiency of such judgment or finding in itself to

constitute property was tacitly denied or disregarded by the Circuit Court of Appeals.

In our view of the case, a judgment or finding of citizenship, carrying with it the special rights and privileges above set forth, as well as numerous other rights, concerning which extended discussion is unnecessary, constituted "liberty" or "property" of which the owner could not be deprived save by "due process of law."

Citizenship is more than a word; citizenship means, as we have above demonstrated, rights, privileges, and immunities not pertaining to non-citizens. The exact question as to how far a right of citizenship is included under the word "liberty" or "property" has received little consideration at the hands of the courts, but in so far as it has been touched upon the expressions of jurists are favorable to our contentions. We refer first to the much quoted and widely approved contention of Webster (Dartmouth College *v.* Woodward, 4 Wheaton, 518) to the effect that—

> "The meaning (law of the land) is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

In Braceville Coal Company *v.* People (147 Ill., 66; 37 Am. St. Repts., 209), cited approvingly in Low *v.* Rees Printing Company (41 Nebraska, 127; 63 Am. St. Repts., 683) it is said:

> "Property in its broader sense is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be acquired over it, and the right of property preserved by the Constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt."

Again, it is declared that the terms "life," "liberty," and "property" are representative, and—

> "within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption of arbitrary arrests, the right to buy and sell as others may—all our liberties, personal, civil and political; in short, all that makes life worth living; and of none of these liberties can any one be deprived except by due process of law."
>
> 2 Story on Constitution, 5th edition, section 1950.

"Liberty" includes the right of a person—

> "to use his faculties in all lawful ways, to live and work where he will and earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. The laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession or confine him to work or live in a specified locality, or exclude him from his own house or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power * * *) are infringements upon his fundamental rights of liberty which are under Constitutional protection."
>
> In matter of Jacobs, 98 U. S., 98.

It has been repeatedly said that the term "property" includes the right to obtain and possess property. See cases above cited.

Furthermore, it is maintained, and that with justice, that a vested right of action is property and beyond the effect of change of law.

Williams *v.* Johnson, 30 Md., 500; 96 Am. Dec., 613.

We have already referred to the rights incident to citizenship, including the right to vote at elections. This particular right, of which, among others, the plaintiff in error

was deprived, is a property right, and so far a property right that for unlawful and malicious interference with its exercise election officers may be mulcted in damages. We refer to the case of Wiley *v.* Sinkler (179 U. S.), wherein, on page 65, this court found it impossible to say that the plaintiff, who claimed to have been unlawfully deprived of the right to vote by the action of election officers, had been damnified in a lesser sum than $2,500, it being the function of the jury to determine the question. This case was followed in Swafford *v.* Templeton (185 U. S., 487), showing that denial of the right to vote created a cause of action.

In the presence of the decisions above quoted and many others which might be cited we are compelled to believe that when the plaintiffs in error lost citizenship through the judgment of the citizenship court they were deprived of their liberty, for they might no longer exercise it within the limits of the Choctaw tribes as citizens; but they were also deprived of their property, for the right to gain a livelihood, to earn property, was in itself a property right, and by the judgment of the citizenship court became trammeled within the limits of the Choctaw Nation.

To say less than this is to say that citizenship is a right of less importance than the right of a corporation to exist; for it is too well established to need citation of authority that a corporation's franchise (which is its right to be a corporation) is a property right. Citizenship means the right of a man to exercise the functions and to be entitled to the immunities of a member of society. It is the badge of his political existence and the breath of his life as a member of the community. Can so great a right be less than liberty and property, and the rights of a man be less than the rights of a corporation?

We are bound, it seems to us, to conclude that the plaintiffs in error by the citizenship court judgment were deprived of something which they could only properly lose by due process of law, and we are brought to the question:

What is Meant by Due Process of Law?

We discuss this but briefly, referring to several of the more useful decisions without elaborating them.

In Holden *v.* Hardy (169 U. S., 389) Justice Brown said:

> "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property *without due notice and an opportunity of being heard in his defense.*"

In Davidson *v.* New Orleans (69 U. S., 97), the court said:

> "Can a State (under the 14th amendment) make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the State is of no avail or has no application where the invasion of private rights is effected under the forms of State legislation."

(Of course, the argument just given, having particular application to the fourteenth amendment affecting States, has a similar and equally forceful effect when applied to "due process of law" as touching Federal action.)

So in C., B. & Q. R. R. *v.* Chicago (166 U. S., 266) the court says that the prohibitions of the 14th amendment—

> "refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities."

In Pennoyer *v.* Neff (95 U. S., 747) Judge Field declared that "due process of law" means—

> "A course of legal proceedings according to those rules and principles which have been established in

> all systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution,—that is by the law of its creation,—to pass upon the subject-matter of the suit, and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State or his voluntary appearance."

The essential point of the foregoing decisions, aside from declaration of the necessity of the use of the other usual legal instrumentalities, is the paramount importance of *notice*.

In the light of the foregoing principles, let us answer, if we may, the question:

Was the Judgment of the Citizenship Court the Result of the Exercise of Due Process of Law?

For the purpose of the argument of this brief merely, let us concede that it was possible for Congress, by suitable legislation, to cause the judgment of the District Court of the Indian Territory, affirmed by the Supreme Court of the United States, to be reviewed by a citizenship court or any commission acting under the forms of law, addressing ourselves, therefore, solely to the inquiry as to whether the forms of law, protective as they are of individual rights and forbidding condemnation without due notice, were departed from in the extraordinary procedure provided by congressional legislation.

The action which, pursuant to legislation, was brought by the Choctaw and Chickasaw nations before the citizenship court was essentially subject to the principles of a bill of review or a bill to impeach a decree; but, before treating it as such, let us consider whether it was within the power of the court, under any theory of chancery powers, to summon ten defendants as representatives of the separate rights of three thousand people.

Let us clearly bear in mind the circumstances. Three thousand people had obtained separate and distinct judgments determining as to each one of them that he had the right to hold office and to enjoy all the other immunities and privileges incident to citizenship in the Indian Territory. The right of each man was distinct from the right of his fellows, depending upon the fact that he individually, or his ancestor, was by birth or adoption a citizen of the Choctaw Nation. No one man could claim a right to citizenship because of anything he held under a common title with another man. The case of each had to stand or fall upon its own merits. The situation was in nowise akin to that presented by cases wherein suits were allowed to be brought in equity against a certain number of persons as representatives, let us say, of all the membership of a voluntary organization jointly interested in the outcome; for in this instance there was no joint interest, each man being concerned only in his own judgment for citizenship, and no man being obliged by virtue of his position to defend a right which he enjoyed in common with another who might be affected by the same principle of decision.

The suit under examination could not be compared to that brought by some shareholders in a joint-stock company of six thousand shares, on behalf of all the stockholders, to compel the directors of the company to refund money improperly withheld by them from the stockholders of the company and applied to their own use (Hitchins *v.* Congreve, 4 Russ., 562-576); for in that case, as the court said, all the shareholders had one common right and one common interest to be subserved by the suit.

And, turning to cases where a few have been permitted to defend for the many, the action under consideration finds no precedent, for instance, in bills which have been permitted to be brought by the lord of a manor against a few of his tenants, defending for all, to establish some right, as, for instance, a right of common or a right to cut turf;

for, as is said in such cases, the bill should be on behalf of or against all the tenants, as, if it be a common right claimed by all and interrupted and denied to all, a bill by a single tenant would not be proper.

Baker *v.* Rogers, Sel. Cas. Ch., 34.

In the present case we note that the first action was brought by single claimants or families of claimants. No one or two or more could have brought suit against the Choctaw or Chickasaw nations, on behalf of themselves and all similarly situated, to establish a common right of citizenship (particular and specific as is such a right), and, conversely, no suit could be brought against a few, requiring them to defend for all, on any theory of common right.

For the purpose of our argument, we need not, at the present time, deny the right of the citizenship court to deal with the ten separable interests represented by the ten defendants actually before the court, but we only deal with the right of representation. As instructive, we find, according to Thornton *v.* Hightower (17 Georgia, 1), that where parties liable to a demand are very numerous a complainant may proceed against a part of them for their *aliquot shares.* The very theory of this decision appears to deny the right of the court to go beyond the aliquot shares and deal with the shares of individuals in person.

In Baker *v.* Portland (Fed. Case No. 777) contractors separately interested in employing Chinese labor were not allowed to join in a bill to permit the carrying out of that purpose, the court saying:

> "They have no common interest in the subject or object of the suit, but assert distinct and several claims against the defendant growing out of distinct and several contracts and matters relating thereto."

The opinion in this case received the confirmation of Mr. Justice Field.

We submit that the idea of this court as to what constitutes "due process of law" in cases such as the present has been crystallized in an appropriate manner in rule 48 of the Rules of Practice in Equity, providing as follows:

> "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. *But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.*"

The idea we are now maintaining finds very direct support in the decisions of this court. In the case of Ayres *v.* Carver (17 How., 591) the complainant sought to establish an equitable title to large tracts of public lands in Mississippi, having offered to comply, as he alleged, with the law providing for the entry and purchase at private sale of the several tracts, but was prevented from making the entries and obtaining the necessary certificates by the illegal and unwarranted acts of the register and receiver at the land office. The bill was filed against the parties who had subsequently entered and paid for the land and obtained the necessary certificates upon which patents had been issued. The defendants were alleged to be very numerous and the court below dispensed with the necessity of making all of them parties, directing that their interests should be represented by some seven, on whom process was directed to be served. This court in commenting upon this procedure said:

> "Without intending to express any definitive opinion in this matter, we may say that it is difficult to see any interest or estate in common among these several defendants that would authorize the rights of the absent parties to be represented in the litiga-

> tion by those upon whom process has been served and who have appeared to defend the suit. Their title to the land claimed by the complainant is *separate and independent, without anything in common, it would seem, that could have the effect to make a decree against one binding upon the others* or even require them to join in the defense."
>
> Smith *v.* Swormstedt, 16 How., 288.

In the case of Smith *v.* Swormstedt, referred to, it was held that where the parties are very numerous and have or may have separate and distinct interests there may be representation:

> "Yet there must be a common interest or a common right which the bill seeks to establish or enforce. As an illustration, bills have been permitted to be brought by the lord of the manor against some of the tenants in behalf of themselves and the other tenants to establish some right, such as suit to a mill, or right of common, or to cut turf. So, by a parson of a parish against some of the parishioners to establish a general right to tithes—or conversely, by some of the parishioners on behalf of all to establish a parochial *modus*."

Over and beyond the reasons above stated for the impossibility of joining ten men to represent three thousand in such a case as the present lies the fact, hereafter more fully adverted to, that the suit in the citizenship court was merely a revival of three thousand actions which had already been carried to judgment, and under such circumstances a review or a new hearing cannot be had without bringing into court the very men designed to be affected by such a course of procedure. This, as we know, was never done.

In addition to the foregoing, as is said by this court in Bank of U. S. *v.* White (8 Pet., 262), Mr. Justice Story speaking—

> "The principle is unquestionable that all the parties to the original decree ought to join in the bill of review."

If we call the highly anomalous proceeding before the citizenship court a bill of review (and whether it be technically so or not, it must be subject to the general principles of law dominating bills of this kind), we must confess that the proceeding should fail for want of proper parties. Out of some three thousand persons, who were not too numerous to successfully prosecute their individual claims to final judgments, ten have been arbitrarily selected, not by the court even, but by the parties adversely interested, and have been caused to stand for their fellows, in defiance of the principle that all the parties originally interested should have been present.

But more. It is well settled that only those who were parties to the original proceeding were entitled to bring a bill of review (Ency. of Law, title Bills of Review, vol. 3, p. 560), while in the present case confessedly as to every one of the defendants before the citizenship court there was at least one nation seeking to have the decrees reviewed which had not been a party to them. So far is the principle to which we have just alluded carried, *cestuis que trustent* represented in the original proceeding by their trustees against whom they make no charges are not entitled to prosecute a bill of review (Shaw *v.* Little Rock and Fort Smith R. R. Co., 10 Otto, 605). And, again, even an assignee was not allowed to prosecute a bill of review (Thompson *v.* Maxwell Land Grant and R. R. Co., 5 Otto, 391).

Was the Proceeding Before the Citizenship Court Good as a Bill to Impeach a Judgment?

The principles involving the right by due process of law to bring bills to impeach judgment do not materially differ from the same rights with relation to bills of review, and we only refer to the suggestion that this may be a bill to impeach a judgment for fear we may be considered to have overlooked it.

According to Encyclopedia of Pleading and Practice (vol. 3, p. 610)—

> "A bill to impeach a decree for fraud is termed generally an original bill in the nature of a bill of review, partaking of the character of both classes of bills, though in its essential features, it is an original and independent proceeding."

In Harwood *v.* Cincinnati and Chicago Air Line Company (17 Wall., 78) it was stated that an attempt to impeach a decree not joining the original party plaintiff was—

> "against authority and principle. No case is cited to justify it and it is believed that none can be found. The judgments of courts of record would be scarcely worth obtaining if they could be thus lightly thrown aside. The absence of the plaintiff in the original suit is a fatal defect."

Nearly three thousand parties in the proceedings before the citizenship court (although the original plaintiffs had been present in the suits before the Dawes Commission and before the district courts) were absent, and so absent without any manifest reason. They were known; they possessed individual rights; so far as we are aware, they resided in the Indian Territory; and yet their property was taken from them without anything approaching due process of law.

Whether we address ourselves, therefore, to the form of the proceeding in the citizenship court as a bill of review or as

a bill to impeach a judgment, whether we consider the parties brought before the court or the manner in which they were so brought, we are bound to conclude that, as against the plaintiffs in error in this case, the judgment of the citizenship court was not due process of law. To the same conclusion must we come if we call it an appeal or quasi-appeal, for no citation was issued, nor were any proceedings had in open court in the district court of the Indian Territory making the issuance of citation unnecessary.

In short, the whole proceeding was the arbitrary exercise of arbitrary power.

Can It Be Suggested That the Proceeding in the Citizenship Court Was a Proceeding in Rem and Personal Notice Was Unnecessary?

The original action seeking for judgment of citizenship was highly personal and not *in rem*. It was not brought to determine the title to property, but to settle a man's right to participate in the affairs of his nation, to partake of the benefits of citizenship, and to be subject to all of its limitations. Since at least the case of Pennoyer *v.* Neff, it has been the established doctrine of this court that personal actions require personal service. That the action was personal is apparent from the language of the act of June 10, 1896 (29 Stat., 321), which authorized the Dawes Commission to—

> "hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled."

The same act further provided that upon appeal to the United States district court—

> "the judgment of the court shall be final."

Certain consequences flow from a judgment of citizenship, the right to a determinate tract of land being one; but the purpose of the suit was to determine citizenship, the consequences being merely incidental.

We do not barter and sell citizenship. It is not sold by weight and measure, as may be articles of personal property, or by acreage, as real estate. It does not lie open to the world, but is the invisible and impalpable panoply of the man who wears it. The law cannot seize upon citizenship and bodily transfer it. The law recognizes it as a condition and a right—a right immediately and intimately personal to the man in whom it is vested—and so it seems to us as really beyond discussion that citizenship is only to be given and only to be taken away when the man affected by it is personally before the court. No pretense of personal service can be suggested as to the client we represent or his three thousand (less ten) associates, and by all the decisions already quoted and by others so numerous that their very citation would weary the court, it can be demonstrated that no judgment of a personal character can be had without the presence of the party concerned, and that this presence must be in person, and not by representation and not by advertisement, we think is already sufficiently demonstrated.

What Analogies are Offered by a Judgment of Naturalization to the Case at Bar?

We shall respectfully submit that in its essence a judgment of citizenship is to be compared to a judgment of naturalization, dealing, as both do, with the relations between the man and the government under which he would place himself. It is argued in the opinion of the Circuit Court of Appeals that the establishment by Congress of tribunals to pass upon the status of men as citizens of the Indian tribes was the endowing of the courts and commissions so authorized with power to pass upon a political question, and, if

Congress were not satisfied with their determination, with the power always in Congress to supervise and change. The opinion says (Record, page 38) that Congress had the right to strike down the judgment—

> "at any time before an allotment of lands under its previous acts had been finally made to the defendant;"

and on page 40, because the Dawes Commission had not allotted the land in dispute to the plaintiff in error—

> "he had * * * acquired no vested right in it as against subsequent legislation of the United States, because until such an allottment was made all the proceedings determinative of citizenship and of distribution which derived their force and effect from the legislative power of the United States alone were necessarily subject to the further exercise of that authority."

The whole argument of the court is based upon the idea that in determining the plaintiff in error to be a citizen the courts exercised therefor a political power.

But was the power exercised by the courts any more a political power than that exercised by them in cases of naturalization? We submit not. The granting of naturalization is undoubtedly a political power. The Constitution declares that Congress shall have power to establish—

> "an uniform rule of naturalization."

This Congress has done in a general way, deputing to courts the determination of the question whether a particular man is entitled to the benefits of citizenship just as Congress might have deputed the power to the clerk of the court, or the United States marshal, or even, if you will, to a postmaster. Equally had Congress power under the Constitution—

> "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,"

and equally could Congress, as it has, confer the power upon the Commissioner of the General Land Office and the Secretary of the Interior to grant mining and other patents to portions of such territory.

When, however, the courts have undertaken to deal with matters of naturalization, they have treated their power as judicial, and their judgments entitled to the same degree of sanctity in such cases as are their judgments in any other cases within their jurisdiction. Perhaps the earliest—certainly one of the most important—cases upon this point was that of Spratt *v.* Spratt (4 Pet., 406). Referring to naturalization, Chief Justice Marshall said:

> "The judgment has been rendered in a form which is unexceptionable. Can we look behind it and inquire on what testimony it was pronounced?"

And, again, on page 406:

> "This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and like every other judgment, to be complete evidence of its own validity."

Among the many citations of the Spratt case of interest in this connection we refer to the Acorn, Fed. Cas. 29, holding order of court of competent jurisdiction admitting an alien to citizenship is conclusive; U. S. *v.* Gleason, 78 Fed., 397; and Pintsch Co. *v.* Bergin, 84 Fed., 141, holding certificate cannot be set aside on ground that facts were falsely represented; Scott *v.* Shobach, 49 Ala., 488, holding certificate cannot be collaterally impeached unless for want of jurisdiction; *Ex parte* Knowles, 5 Cal., 301, declaring power to naturalize is judicial by act of Congress; State *v.* Macdonald, 24 Minn., 59; and McCarthy *v.* Marsh, 5 N. Y.,

284, holding record of proceedings in naturalization cannot be questioned collaterally; People *v.* Snyder, 41 N. Y., 409; Commonwealth *v.* Towles, 5 Leigh, 746, and State *v.* Hoeflinger, 35 Wis., 400, maintaining record of naturalization is conclusive; State *v.* Brandhorst, 156 Mo., holding judgment naturalizing minor cannot be collaterally attacked.

In the last-named case it was held that judgment of naturalization could only be annulled or set aside by appeal or writ of error taken for that very purpose, but might be impeached for fraud, for which see U. S. *v.* Norsch, 42 Fed., 417.

The authorities indicating that judgments of naturalization may be vacated upon bills in equity filed by the Attorney General in the Circuit Court of the United States are summed up in Moore's Digest of International Law, title Nationality, vol. 3, page 500.

It has been apparently beyond judicial conception that a judgment of naturalization could be set aside save in a direct proceeding for that purpose (or on appeal), in which the very person receiving the naturalization was a responsive party and brought into court by personal process to answer the complaint against him. Such for one hundred years has been due process of law in this respect, based upon notice and the right of the true defendant to be heard. Can any reason be suggested why a determination of a court adjudging citizenship should be treated with less respect?

We will not lose sight of the fact that even the member of a voluntary association may not be excluded from its organization save upon due notice and upon sufficient grounds. Shall a lesser rule be applied to those who by the judgment of courts have been determined to be members of Indian tribes?

The suggestion is apparently made in the opinion of the Circuit Court of Appeals that the plaintiffs in error have no cause of complaint in the granting of a new trial (the

court ignoring the errors and blunders in connection with the new trial, if it be so called, to which we have alluded) because they obtained from the Dawes Commission and district court new trials of their right of citizenship after they had been "rejected" as citizens by the duly constituted authorities of the Choctaw Nation. We are unable to discover upon the face of the record by what authority the Circuit Court of Appeals found the rejection of citizenship. The answer (Record, page 7) shows that the citizenship had been "questioned."

We do not deny the superior right of the United States Congress to fix rules and regulations by which the citizenship question could be finally determined, even after the tribal authorities had acted, although they did not act in this case. We do deny the right of the United States Congress to take away substantial rights, privileges, and immunities once duly conferred, and particularly to take them away without due process of law.

Was the Plaintiff in Error in This Case a Choctaw Citizen in the Full Sense of the Term?

While the judgment in the District Court of the Indian Territory conferred citizenship without qualification or limitation, it may be worth while, in view of the language of the Supreme Court in the case of Stephens *v.* Cherokee Nation (174 U. S., 445), to demonstrate that Choctaw citizenship as conferred upon the plaintiff in error carried with it all the rights, privileges, immunities, and property that could possibly attach to the word. The particular language in the Stephens case to which we refer is as follows:

> "It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made as if there might be circumstances under which the right to share in the latter would not necessarily follow from the concession of the former."

We are moved the more to discuss this proposition with regard to our Choctaw clients because of the recent consideration of different grades of citizenship in the case of Red Bird *v.* The U. S. (decided November 5, 1903), and which discusses the limitation of citizenship attached to intermarried white persons claiming under Cherokee laws.

The finding of the District Court of the Indian Territory was that the plaintiff in error (with others) should—

> "be admitted as members of the Choctaw tribe of Indians by blood and that the applicants, Amanda Hill, wife of J. M. Hill, and Adelia Hill, wife of B. C. Hill, each and both be admitted as members of the Choctaw Nation by intermarriage" (Record, page 8).

Article 38 of the treaty of 1866 between the Choctaws and Chickasaws provides:

> "Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."

The Choctaw laws (Durant's Constitution and Laws of the Choctaw Nation, published by authority of the General Council, page 225) provided the circumstances under which—

> "any white man, a citizen of the United States or any foreign government, desiring to marry a Choctaw woman may so do;"

and section 5 of the act says:

> "Should any man or woman, a citizen of the United States or of any foreign country, become a

> citizen of the Choctaw Nation by intermarriage as herein provided and be left a widow or widower, he or she shall continue to enjoy the rights of citizenship unless he or she shall marry a white man or woman or person, as the case may be, having no rights of Choctaw citizenship by blood; in that case all his or her rights acquired under the provisions of this act shall cease."

The same laws fix the degree of Choctaw blood entitling one to citizenship to be one-eighth. (Page 266.)

By the act of May 21, 1883 (on page 335 of the same publication) freedmen are given the full right of citizenship—

> "except in the annuity moneys and the public domain of the nation."

From the foregoing, no other qualifications being known to us, it sufficiently appears that the plaintiff in error in this case, B. C. Hill, the only real party in interest, has been duly found to be a Choctaw citizen by blood, and as such is subject to no disability whatever in the way of claiming title to part of the former property of the nation.

Summary.

Summarizing the foregoing, we conclude that—

The plaintiff in error at the time the Citizenship Commission undertook to set aside his judgment was a citizen of the United States, entitled to all the protection given by our Constitution and laws.

He enjoyed a right of property in the judgment of a Federal court finding that he was a Choctaw citizen.

This right of property or, as it might be styled, "liberty" or "immunity" he could only be deprived of by due process of law.

The Citizenship Commission undertook to deprive him of this right of property without due process of law, in that—

a. He was never made a party in his own name to the proceedings brought to destroy the judgment of the District Court of the Indian Territory.

b. While the principle of representation is attempted to be applied to him, it could not be so applied.

c. The proceeding to set aside his judgment was personal in its nature, and yet an attempt was made to bring him in by representation and by publication, contrary to law and practice.

d. Only parties to the prior bill or judgment can be made parties to a bill of review or bill to impeach a judgment, and yet in this case a new party was introduced, and the original parties plaintiff ignored except as to ten.

The plaintiff in error was by the judgment of the District Court in the Indian Teritory made a Choctaw citizen in the full sense of the term and entitled to share in the lands and funds of the tribe.

In view of all the foregoing considerations, we respectfully submit that the judgment below must be reversed and the prior judgment of the United States Court for the Indian Territory and of the Supreme Court of the United States must be sustained.

Respectfully submitted.

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